



Agricultural Marketing Service

7 CFR Parts 920 and 944

[Doc. No. AMS-SC-21-0098]

California and Imported Kiwifruit; Handling Regulations

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Kiwifruit Administrative Committee (Committee) to modify the handling regulations prescribed under the Federal marketing order for kiwifruit grown in California. This action revises the size and uniformity requirements for all varieties of *Actinidia chinensis* species kiwifruit, which is commonly known as golden kiwifruit, regulated under the marketing order. A corresponding change is also made to the kiwifruit import regulation as required under section 8e of the Agricultural Marketing Agreement Act of 1937.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Senior Marketing Specialist, or Gary Olson, Regional Director, Western Region Field Office, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2724, or Email: Barry.Broadbent@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final

rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California. Part 920 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Committee locally administers the Order and comprises kiwifruit growers operating within the production area, and a public member.

This final rule is also issued under section 8e of the Act (7 U.S.C. 608e-1), which provides that whenever certain specified commodities, including kiwifruit, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for domestically produced commodities.

The Agricultural Marketing Service (AMS) is issuing this final rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This final rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined this final rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian

tribes.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the United States Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

Under the provisions of the Order, fresh market shipments of kiwifruit produced in California are required to be inspected and are subject to grade, size, quality, maturity, pack, and container requirements. This final rule revises the minimum size and uniformity requirements for certain varieties of kiwifruit handled under the Order. As required by section 8e of the Act, the revision to the minimum size requirement will also be applied to the import regulations for kiwifruit.

Section 920.51 of the Order provides authority for the Committee to recommend regulations to the Secretary. Section 920.52 of the Order provides authority for the establishment of handling regulations. Further, § 920.53 provides the authority to

recommend the modification, suspension, or termination of such regulations when the Committee finds that industry conditions so dictate. Section 920.302 establishes the minimum grade, size, quality, maturity, pack, and container requirements for kiwifruit handled subject to the Order. Under the authority of § 920.53, the Committee determined that the production and marketing conditions for some varieties of kiwifruit have changed and that the handling requirements should be modified accordingly.

Prior to this rule change, the handling regulations required that all varieties of kiwifruit be a minimum Size 45, defined as a maximum of 55 pieces of fruit in an 8-pound sample. In addition, kiwifruit packed in containers were required to be fairly uniform in size.

At its meeting on September 29, 2021, the Committee unanimously recommended modifying the regulations to accommodate varieties of *Actinidia chinensis* species kiwifruit that are characteristically smaller in size and less uniform than the more common varieties grown in California that are *Actinidia deliciosa* species. No other species of kiwifruit are known to be grown in California.

This final rule relaxes the minimum size requirement for all varieties of *Actinidia chinensis* species kiwifruit to Size 49, defined in the requirements as a maximum of 64 pieces of fruit in an 8-pound sample. In addition, the final rule exempts all varieties of *Actinidia chinensis* species kiwifruit from the requirement that fruit packed in a container be fairly uniform in size.

At the time that the Order's handling regulations were established in 1985, practically all the kiwifruit grown in California were varieties of the *Actinidia deliciosa* species. As such, the requirements were implemented to accommodate the characteristics of those varieties. Recently, production of varieties of *Actinidia chinensis* species kiwifruit has been increasing in California. This sector of the industry now accounts for approximately eight percent of the acreage and five percent of the production in the state.

Given the natural characteristics of *Actinidia chinensis* species kiwifruit, the current minimum size and uniformity requirements preclude some high-quality kiwifruit from entering the fresh market. Relaxing the minimum requirements for those varieties will allow growers to market more of their fruit in the fresh market, increasing their total revenue. The change is expected to benefit domestic kiwifruit growers, handlers, and consumers.

Section 8e of the Act provides that when certain domestically produced commodities, including kiwifruit, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this action modifies the minimum size requirement for varieties of *Actinidia chinensis* species kiwifruit under the domestic handling regulations, a corresponding change is made to the import regulations.

Minimum grade, size, quality, and maturity requirements for kiwifruit imported into the United States are currently in effect under § 944.550 (7 CFR 944.550).

Paragraph (a) of that section specifies the minimum size requirement. This final rule lowers the minimum size requirement for varieties of *Actinidia chinensis* species kiwifruit to Size 49, defined as a maximum of 64 pieces of kiwifruit in an 8-pound sample. In accordance with the Act, under the kiwifruit import regulations, imported kiwifruit are not subject to container and pack requirements. Accordingly, the change in the Order's uniformity requirement does not affect the kiwifruit import requirements.

The relaxation in the size requirements for imports of *Actinidia chinensis* varieties will allow a greater quantity of kiwifruit to be imported. The change is expected to benefit kiwifruit importers and consumers of imported kiwifruit.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Import regulations issued under the Act are based on those established under Federal marketing orders.

There are approximately 133 kiwifruit growers in the production area and 20 handlers subject to regulation under the Order. In addition, there are approximately 80 importers of kiwifruit. Small producers of kiwifruit are defined by the Small Business Administration (SBA) as those having annual receipts less than \$3,000,000. Small agricultural service firms, which include kiwifruit handlers and importers, are defined by the SBA as those having annual receipts of less than \$30,000,000. The SBA threshold for growers changed in between the proposed and the final rule. Thus, AMS changed the RFA to reflect the new amount in this final rule. The change did not impact the number of growers considered to be small.

The USDA National Agricultural Statistics Service (NASS) reported that total production of California kiwifruit for the 2020-2021 season was 39,760 tons. NASS further reported that the average producer price was \$1,920 per ton over that period. Multiplying \$1,920 per ton by the production quantity of 39,760 tons yields an annual crop revenue estimate of \$76,339,200. The average annual fresh kiwifruit revenue for each of the 133 growers for the 2020-2021 season is therefore calculated to be \$573,979 (\$76,339,200 divided by 133), which is less than the SBA threshold of \$3,000,000 for small producers of kiwifruit. Therefore, on average and given a normal distribution, the

majority of growers may be classified as small businesses.

In addition, based on information reported by USDA's Market News Service (Market News), the average Free On Board (F.O.B.) shipping point price for California kiwifruit over the 2020-2021 season was \$23.28 per 9 kilogram container (19.8 pounds equivalent). Multiplying \$23.28 by the shipment quantity of 4,016,162 containers (39,760 tons times 2,000 pounds per ton divided by 19.8 pounds) yields an annual crop revenue estimate of \$93,496,251. The average annual fresh kiwifruit revenue for each of the 20 handlers is therefore calculated to be \$4,674,813 (\$93,496,251 divided by 20), which is below the SBA threshold of \$30,000,000 for agricultural service firms. Therefore, on average and assuming a normal distribution, the majority of the handlers may be classified as small businesses.

Further, USDA's Foreign Agricultural Service reported 80,279 metric tons of kiwifruit were imported during the 2020-2021 season with a reported value of \$184,488,000. Using that data, the average revenue for each of the approximately 80 kiwifruit importers would be \$2,306,100 (\$184,488,000 divided by 80), which is below the \$30,000,000 SBA threshold for small agricultural service firms. As such, the majority of kiwifruit importers may be classified as small businesses.

This final rule relaxes the minimum size and uniformity requirements prescribed in the Order's handling regulations. The final rule lowers the minimum size requirement for all varieties of *Actinidia chinensis* species kiwifruit from Size 45 to 49, defined in the requirements as a maximum of 64 pieces of fruit in an 8-pound sample. In addition, the final rule exempts all varieties of *Actinidia chinensis* species kiwifruit from the Order's container requirement that fruit be fairly uniform in size.

This action will not impose any additional costs to the industry. It is expected to increase revenue to handlers and growers of *Actinidia chinensis* species varieties of kiwifruit, as smaller size fruit, and fruit that lacks uniformity, will be allowed to enter the

market. The quality of fruit to consumers is not expected to be significantly affected, as relaxing the size and uniformity requirements will not impact the Order's minimum quality requirements. All kiwifruit marketed under the Order will continue to be packed to the minimum grade of KAC No.1.

The Committee considered alternatives to the recommended changes, including taking no action and continuing to regulate according to the requirements as currently established. In addition, the Committee considered lowering the size requirements for all varieties of kiwifruit. However, the Committee determined that the minimum size requirement is effective for *Actinidia deliciosa* varieties and that it should not be changed. The Committee also considered establishing other minimum sizes for *Actinidia chinensis* varieties higher and lower than the minimum size recommended but believed that Size 49 will allow more fruit to be marketed and still maintain the high standards of California kiwifruit. Ultimately, the Committee determined that relaxation of the handling regulation, as recommended, is in the best interests of the growers, handlers, and consumers of California kiwifruit and rejected all other alternatives.

Committee meetings were widely publicized throughout the California kiwifruit industry. All interested persons were invited to attend meetings and participate in Committee deliberations. Like all Committee meetings, the September 27, 2021, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue. Also, the embassies of countries that export kiwifruit to the United States, and known kiwifruit importers, will be notified of this final rule upon its publication. Finally, interested persons were invited to submit comments on the proposed rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the

Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Fruit Crops. No changes in those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule does not impose any additional reporting or recordkeeping requirements on either small or large kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on June 17, 2022 (87 FR 36412). Copies of the proposed rule were also mailed or sent via email to all California kiwifruit handlers. A copy of the proposed rule was made available through the internet by AMS. A 60-day comment period ending August 16, 2022, was provided for interested persons to respond to the proposal. Three comments were received in favor of the rule. Accordingly, no changes have been made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information,

USDA has determined that this final rule is consistent with and will effectuate the purposes of the Act.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this final rule.

List of Subjects

7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges, Plums, Prunes.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR parts 920 and 944 as follows:

PART 920 – KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Amend § 920.302 by:

a. Revising paragraphs (a)(2), (a)(4) heading, and (a)(4)(i); and

b. In paragraph (a)(4)(ii)(A):

i. Designating the table as table 1 to paragraph (a)(4)(ii)(A);

ii. Revising the three column headings;

iii. Removing the entry for “45 or smaller” and adding an entry for “45” in its place; and

iv. Adding an entry for “49” in numerical order and footnotes 1 and 2 at the end of the table.

The revisions and additions read as follows:

§ 920.302 Grade, size, pack, and container regulations.

(a) * * *

(2) *Size requirements.* Such kiwifruit, except for varieties of the *Actinidia chinensis* species, shall be at least a minimum Size 45, defined as a maximum of 55 pieces of fruit in an 8-pound sample. Varieties of the *Actinidia chinensis* species shall be at least a minimum Size 49, defined as a maximum of 64 pieces of fruit in an 8-pound sample.

* * * * *

(4) *Pack requirements.* (i) Kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays shall be of proper size for the cells, fillers, or molds in which they are packed. Such fruit, except for varieties of the *Actinidia chinensis* species, shall be fairly uniform in size.

(ii)(A) * * *

Table 1 to Paragraph (a)(4)(ii)(A) -- Size Designation and Size Variation Chart

Size designation	Maximum number of fruit per 8-pound sample	Size variation tolerance (diameter) ¹
* * * * *		
45	55	1/4-inch (6.4 mm).
49 ²	64	Not applicable

¹ Not applicable to *Actinidia chinensis* species varieties.

² Applicable only to *Actinidia chinensis* species varieties.

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PART 944 - FRUITS; IMPORT REGULATIONS

3. The authority citation for 7 CFR part 944 continues to read as follows:

Authority: 7 U.S.C. 601-674.

4. Amend § 944.550 by revising paragraph (a) to read as follows:

§ 944.550 Kiwifruit import regulation.

(a) Pursuant to section 8e of the Agricultural Marketing Agreement Act of 1937, as amended, the importation into the United States of any kiwifruit is prohibited unless such kiwifruit meets all the requirements of a U.S. No. 1 grade as defined in the United

States Standards for Grades of Kiwifruit (7 CFR 51.2335 through 51.2340), except that the kiwifruit shall be “not badly misshapen,” and an additional tolerance of 16 percent is provided for kiwifruit that is “badly misshapen,” and except that such kiwifruit shall have a minimum of 6.2 percent soluble solids. Such fruit, except for varieties of the *Actinidia chinensis* species, shall be at least Size 45, which means there shall be a maximum of 55 pieces of fruit in an 8-pound sample. Varieties of the *Actinidia chinensis* species shall be at least Size 49, which means there shall be a maximum of 64 pieces of fruit in an 8-pound sample. The average weight of all samples in a specific lot must weigh at least 8 pounds (3.632 kilograms), provided that no individual sample may be less than 7 pounds 12 ounces (3.472 kilograms).

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Erin Morris,

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Agricultural Marketing Service.

[FR Doc. 2023-01701 Filed: 1/27/2023 8:45 am; Publication Date: 1/30/2023]